

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
		B. Received by (Printed Name) Chad Schulze	C. Date of Delivery 8/29/17
Corporation Service Company Registered Agent for: Lowe's Home Centers, LLC 300 Deschutes Way SW Suite 304 Tumwater, Washington 98501		address different from item 1? <input type="checkbox"/> Yes ter delivery address below: <input type="checkbox"/> No	
 9590 9402 2525 6306 9823 98		3. Service Type <input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Mail Restricted Delivery (DD)	
2. Article Number (Transfer from service label) 7016 2710 0000 2872 2049		<input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery	
PS Form 3811, July 2015 PSN 7530-02-000-9053		Domestic Return Receipt	

U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only	
For delivery information, visit our website	
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<input type="checkbox"/> Adult Signature	
<input type="checkbox"/> Adult Signature Restricted Delivery	
Postage	\$
Sent by	
Street and	Box No.
City, State, ZIP	
Corporation Service Company Registered Agent for: Lowe's Home Centers, LLC 300 Deschutes Way SW Suite 304 Tumwater, Washington 98501	
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions	

Schulze Chad 8/29/17

USPS TRACKING#



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Chad Schulze /dc
Office of Compliance & Enforcement
Mail Stop OCE - 101
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140



Certified Mail service provides the following benefits:

- A receipt (this portion of the Certified Mail label).
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for an electronic return receipt, see a retail associate for assistance. To receive a duplicate return receipt for no additional fee, present this USPS®-postmarked Certified Mail receipt to the retail associate.

- Restricted delivery service, which provides delivery to the addressee specified by name, or to the addressee's authorized agent.
- Adult signature service, which requires the signee to be at least 21 years of age (not available at retail).
- Adult signature restricted delivery service, which requires the signee to be at least 21 years of age and provides delivery to the addressee specified by name, or to the addressee's authorized agent (not available at retail).

- To ensure that your Certified Mail receipt is accepted as legal proof of mailing, it should bear a USPS postmark. If you would like a postmark on this Certified Mail receipt, please present your Certified Mail item at a Post Office™ for postmarking. If you don't need a postmark on this Certified Mail receipt, detach the barcoded portion of this label, affix it to the mailpiece, apply appropriate postage, and deposit the mailpiece.

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PS Form 3800, April 2015 (Reverse) PSN 7530-02-000-9047



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Reply to: OCE-101

AUG 29 2017

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Corporation Service Company
Registered Agent for:
Lowe's Home Centers, LLC.
300 Deschutes Way SW STE 304
Tumwater, Washington 98501

Re: **Stop Sale, Use, or Removal Order for the unregistered pesticide product "Black Flag Disposable Fly Trap"**
Docket No. FIFRA-10-2017-0105

Dear Madam or Sir:

This letter provides Lowe's Home Centers, LLC ("Lowe's"), notice that the U.S. Environmental Protection Agency, Region 10 ("EPA") has issued a Stop Sale, Use, or Removal Order ("Order") prohibiting the distribution, sale, or use of the pesticide product "Black Flag Disposable Fly Trap" under Section 13(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136k(a). The enclosed Order is effective immediately upon receipt and pertains to all such products under the control, ownership, or custody of Lowe's.

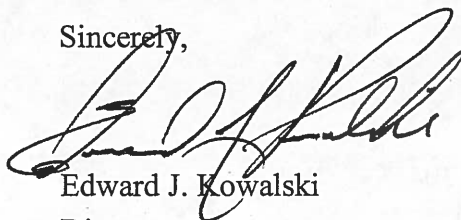
EPA issued the Order because EPA has reason to believe that the product "Black Flag Disposable Fly Trap" is in violation of FIFRA. This product is being "offered for sale" through webpages operated by Lowe's and through Lowe's stores in Seattle, Washington.

The labels and advertisements for "Black Flag Disposable Fly Trap" bear pesticidal claims, yet this product has not been registered as a pesticide under FIFRA Section 3, 7 U.S.C. § 136a. Therefore, any distribution or sale of the unregistered pesticide "Black Flag Disposable Fly Trap" is in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

Pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), Lowe's may **not** sell, offer to sell, use, distribute, or remove the unregistered pesticide product "Black Flag Disposable Fly Trap." Any violation of the Order may result in the imposition of civil or criminal penalties as prescribed by Section 14 of FIFRA, 7 U.S.C. § 136l. The issuance of this Order does not constitute a waiver by the EPA of its remedies, either judicial or administrative, under FIFRA or any other federal environmental law to address this matter or any other matters of unlawful acts not specified in this Order.

In accordance with the enclosed Order, within 30 days of receipt of this letter, please provide a written response describing the steps Lowe's will take to comply with FIFRA, as well as a current inventory of the product subject to the Order, to Mr. Chad Schulze at U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900 (OCE-101), Seattle, Washington 98101, or at Schulze.Chad@epa.gov. Mr. Schulze may be reached by telephone at (206) 553-0505. Questions from legal counsel should be directed to Brett Dugan, Office of Regional Counsel, at (206) 553-8562 or dugan.brett@epa.gov.

Sincerely,



Edward J. Kowalski
Director

Enclosure

cc: Ms. Kimberly Bingham
EPA Region 4

Mr. Ross W. McCanless
Manager, Lowe's Home Centers, LLC
General Counsel, Secretary and Chief Compliance Officer, Lowe's Companies, Inc.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE, SUITE 900
SEATTLE, WASHINGTON 98101**

In the Matter of:

Lowe's Home Centers, LLC

**Wilkesboro,
North Carolina,**

Respondent.

**ORDER
SECTION 13(a)**

**FEDERAL INSECTICIDE, FUNGICIDE
AND RODENTICIDE ACT**

Docket No. FIFRA-10-2017-0105

I. Authority

1. This Stop Sale, Use, or Removal Order ("Order") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by section 13(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136k(a), which authorizes the Administrator of the EPA to issue an order prohibiting the sale, use, or removal of any pesticide or device by any person who owns, controls, or has custody of such pesticide or device whenever there is reason to believe that, *inter alia*, the pesticide or device is in violation of any provision of FIFRA or the pesticide or device has been or is intended to be distributed or sold in violation of any provision of FIFRA.
2. This authority has been delegated from the EPA administrator to the EPA Region 10 Director of the Office of Compliance and Enforcement.
3. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to sell or distribute to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

5. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide,” in part, as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” *See also* 40 C.F.R. § 152.15.
6. The regulation at 40 C.F.R. § 152.15 states that “[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if: (a) [t]he person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) . . . [t]hat the substance . . . can or should be used as a pesticide; or . . . (b) [t]he substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than . . . use for pesticidal purpose (by itself or in combination with any other substance) . . . or (c) [t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.”
7. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “any insect, rodent, nematode, fungus, weed, or . . . any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section [25(c)(1) of FIFRA].”
8. Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.” This section also defines “labeling” as “all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device.”
9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” as “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”
10. The regulation at 40 C.F.R. § 152.3 further defines “distribute or sell” as “the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.”
11. The regulation at 40 C.F.R. § 168.22(a) states, in part, “FIFRA sections 12(a)(1)(A) and (B) make it unlawful for any person to ‘offer for sale’ any pesticide if it is unregistered.” The regulation further states, “EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.”

II. Background

12. Lowe's Home Centers, LLC ("Respondent") is a corporation operating within the United States. Therefore, Respondent meets the definition of a "person" in section 2(s) of FIFRA, 7 U.S.C. § 136(s).
13. Respondent's principal place of business is located at 1605 Curtis Bridge Road, Wilkesboro, North Carolina.

Pesticidal Claims

14. On September 27, 2016, EPA Region 10 conducted a for-cause marketplace inspection at the Respondent's retail store at 2700 Rainier Ave South, Seattle, Washington 98144.
15. During the inspection, EPA identified the product "Black Flag Disposable Fly Trap" being "offered for sale" on Respondent's store shelves. The product included a plastic bag (the trap) with a small pouch of light-yellow attractant powder.
16. The "Black Flag Disposable Fly Trap" label printed on the plastic bag stated, in pertinent parts:
 - Black Flag Disposable Fly Trap
 - Locate fly source outdoors. Common fly sources include garbage bins, compost piles, dog runs or kennels and campsites
 - Hang trap outdoors near fly source with included plastic tie to attract flies away from outdoor living spaces
 - Attractant in trap will dissolve in water, sending an outdoor odor to lure flies into trap
 - Hang trap in well-ventilated area to avoid odor
 - Distributed by Chemsico, Division of United Industries Corporation
17. The label also contained five EPA establishment numbers. According to the lot number on the packaging "BX-03286", the correct EPA establishment number was, "EPA Est. No. 80202-MO-1 (BX)" out of Manchester, Missouri.
18. The fly traps were sold in cut-out, cardboard boxes that stated:
 - Black Flag Disposable Fly Trap
 - Kills Insects By Drowning
 - Starts Working in Minutes
 - Attracts All Major Fly Species

19. The cardboard boxes also had a graphic depicting a fly being killed by the "Black Flag" pole.

Product Composition

20. On September 15, 2016, EPA Region 10 ordered eight "Black Flag Disposable Fly Trap" units from the Respondent's website, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>. The eight traps were from two lots, LOT# BX-05236 and LOT# BX-03286.
21. During the September 27, 2016, inspection, EPA Region 10 collected two additional "Black Flag Disposable Fly Trap" products being offered for sale on Respondent's shelves. Both traps were from the same lot, LOT# BX-03286.
22. On September 28, 2016, EPA Region 10 shipped three "Black Flag Disposable Fly Trap" products to The Washington State Department of Agriculture's Chemical and Hops Laboratory (WSDA CHL) to be analyzed for Indole and/or Heptyl Butyrate or any other chemical attractant. The three samples included two of the eight traps purchased from the Respondent's website on September 15, 2016, (Sample No.'s 091516-F17746-001-001-CS (LOT# BX-05236) and 091516-F17746-001-002-CS (LOT# BX-03286)) and one collected during the September 27, 2016, inspection (Sample No. 092716-F17746-001-001-CS (LOT# BX-03286)).
23. On January 4, 2017, EPA Region 10 received the analytical results from WSDA CHL. The results showed that all three traps contained Indole (CAS #120-72-9) at concentrations varying between 8.10 and 11.3 percent by weight. The results also showed that each trap contained trace amounts of 2-piperidinone (CAS #675-20-7).
24. Currently, there are two EPA registered pesticides and one pending that contain Indole as the active ingredient. The concentrations of Indole in these products range from 0.2 and 0.5 percent by weight. There are no EPA registered pesticides containing 2-piperidinone.
25. For the purposes of the exemptions contained in 40 C.F.R. § 152.25(b) and (d), neither Indole nor 2-piperidinone are pheromones nor foods.

Product Distribution and Sale

26. On September 8, 2016, prior to conducting the September 27, 2016, inspection, EPA Region 10 visited the Respondent's web page, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>.
27. The webpage offered for sale the product, "Black Flag Disposable Fly Trap." Once purchased, the customers could have the product delivered directly to their home or they could pick it up at a local retail location.

28. On September 15, 2016, EPA Region 10 purchased eight "Black Flag Disposable Fly Trap" products through this site and picked them up at Respondent's Lynnwood, Washington location.
29. On September 27, 2016, just before conducting the inspection, EPA Region 10 again visited the Respondent's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that "Black Flag Disposable Fly Trap" products were still offered for sale.
30. During the September 27, 2016, inspection, the EPA Region 10 inspector purchased two "Black Flag Disposable Fly Trap" products at the Respondent's 2700 Rainier Ave South, Seattle, Washington location.
31. On March 26, 27, 28, 29 and 30, 2017, EPA Region 10 again visited the Respondent's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that the "Black Flag Disposable Fly Trap" products were being offered for sale each day.
32. On January 22, 2015, inspectors from the North Carolina Department of Agriculture and Consumer Services' (NCDACS) conducted a for-cause inspection on EPA's behalf at Respondent's 509 River Highway, Mooresville, North Carolina retail store.
33. According to the photographs collected by the NCDACS inspector, the product label statements were identical in all material respects to the label statements found on the products collected by EPA Region 10 on September 15, 2016, through Respondent's online retail webpage and during the September 27, 2016 inspection of Respondent's Seattle, Washington establishment.
34. During the inspection, the NCDACS inspectors identified 34 separate units of "Black Flag Fly Trap" being offered for sale on Respondent's shelves.
35. According to records collected by NCDACS, Respondent purchased 2,400 units of "Black Flag Disposable Fly Trap" from United Industries Corporation on July 12, 2015, and transferred 48 units to the Mooresville retail store on October 27, 2015.

III. Basis for the Order

36. EPA has reason to believe on the basis of inspection and tests that Respondent distributed or sold and intends to distribute or sell the product "Black Flag Disposable Fly Trap" as the term "to distribute and sell" is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3.

37. The product labeling and advertisements for "Black Flag Disposable Fly Trap," as listed in paragraphs 14 through 19, render this product a pesticide as that term is defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
38. Indole does not have any significant commercially valuable use as distributed and sold other than use for pesticidal purposes. Therefore, the product composition for "Black Flag Disposable Fly Trap," as listed in paragraphs 20 through 25, render this product a pesticide as that term is defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
39. At no time relevant to this Order has the product "Black Flag Disposable Fly Trap" ever been registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.
40. Therefore, EPA has reason to believe on the basis of inspection and tests that the distribution and sale of the product "Black Flag Disposable Fly Trap," constitutes a violation of FIFRA in accordance with Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

IV. Order

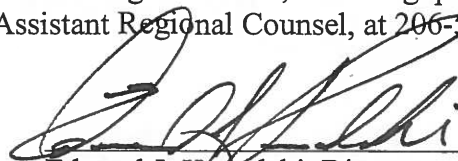
41. Pursuant to the authority of Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), EPA hereby orders Respondent to **immediately cease** the sale, use, or removal of the unregistered pesticide product "Black Flag Disposable Fly Trap" ("Violative Product") under its ownership, control or custody, wherever such products are located, except in accordance with the provisions of this Order.
42. This Order shall extend to all quantities of the Violative Product intended for sale, distribution, and/or any stocks returned to Respondent from its customers.
43. The Violative Product shall not be used, sold, offered for sale, held for sale, shipped, delivered for shipment, received, or having so received, shall not be delivered, or offered for delivery, for any reason, unless approved by the EPA in writing. Any proposal for movement of the Violative Product shall be submitted to Chad Schulze at U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900 (OCE-101), Seattle, Washington 98101, or at Schulze.Chad@epa.gov, and shall include:
- (a) The purpose for which the movement is being requested;
 - (b) An accounting of the quantities of product to be moved, including location(s), and quantities from each location; and
 - (c) The destination location to which the product will be moved.
44. Within 30 days of receipt of this Order, Respondent must provide a written response describing the steps it will take to comply with FIFRA to Mr. Chad Schulze at U.S. EPA

Region 10, 1200 Sixth Avenue, Suite 900 (OCE-101), Seattle, Washington 98101, or at Schulze.Chad@epa.gov. Mr. Schulze may be reached by telephone at (206) 553-0505. Respondent shall include in the written response a current inventory of all Violative Products. The inventory shall specify the location(s) where the products are held and quantities.

45. Respondent may seek federal judicial review of the Order pursuant to Section 16 of FIFRA, 7 U.S.C. § 136n. The issuance of this Order does not constitute a waiver by the EPA of its remedies, either judicial or administrative, under FIFRA or any other federal environmental law to address this matter or any other matters of unlawful acts not specified in this Order.
46. Any person violating the terms or provisions of this Order is subject to penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.
47. This Order is effective immediately upon receipt by Respondent or any agents of Respondent.
48. This Order shall remain in effect unless and until revoked, terminated, suspended, or modified in writing by EPA.
49. If any provision or provisions of this Order is/are subsequently held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and they shall remain in full force and effect.

V. Other Matters

50. For any additional information about this Order, please contact Mr. Chad Schulze at 206-553-0505. For any legal matters concerning this Order, including questions from legal counsel, please contact Brett Dugan, Assistant Regional Counsel, at 206-553-8562.



Edward J. Kowalski, Director
Office of Compliance and Enforcement

When complete email this form & enclosures to R10OCEAdminTeam@epa.gov

Office of Compliance and Enforcement
CORRESPONDENCE ACTION REQUEST

8/29/17
Debbie C.

AUTHOR: Chad Schulze DATE SUBMITTED: 8/28/2017 SECRETARY:

ACTIONS NEEDED: Proof read, edit, prepare correspondence folder, mail

DEADLINE FOR MAILING: 9/1/2017 - Need Expedited Review (at EPA HQ's request)

CERTIFIED MAIL: YES

OVERNIGHT MAIL:

SPECIAL INSTRUCTIONS:

SIGNER: DIRECTOR – Ed Kowalski

FILE NAME: N:\APPS\OCE\Pesticides and Toxics\Pesticides Enforcement\2017 Enforcement Actions\Compliance Orders (SSUROs)\Lowe's Home Centers, LLC:

1 - Compliance Order Cover Letter Lowe's

1a - Compliance Order FIFRA Lowe's

CONCURRENCES						
Title:	Compliance Officer	Unit Manager	Director	DRA	RA	
Name:	See accompanying enforcement checklist for concurrences block					
Initials:						
Date:						

ADDITIONAL DISTRIBUTION:

Include mailing addresses and/or email addresses for all cc's and bcc's

CC:

With
enclosure

✓ Mr. ROSS W. McCANLESS, MANAGER
Mr. Robert A. Niblock, Chairman, President and CEO
Lowe's Home Centers, LLC – Corporate Office
1000 Lowes Blvd
Mooresville, NC 28117

✓ Ms. Kimberly Bingham
EPA Region 4
61 Forsyth Street
SW Atlanta, GA 30303

mailed
8/29/17
DC ✓

WHERE TO FILE: Official/Program: ☒ Chrono: ☒ Other:

CORR Log

2 + 2

4C. Administrative Compliance Order – Unilateral*

(includes CWA 309(a) orders, CAA 113(a) orders, FIFRA stop sale orders, SDWA 1414(g)(1) orders, RCRA 3013)

Case Name: Lowe's Home Centers, LLC.
City/State: Mooreville, NC Wilkesboro

CONCURRENCES					
Title:	Compliance Officer	ORC Attorney	Program Unit Manager	ORC Unit Manager	Regional Counsel
Name:	Schulze, C.	Dugan, B.	McFadden, K.	Matthews, J.	Stern, A.
Initials:	CS	BDD	KJM	JM	AS
Date:	8/29/17	8/29/17	8/29/17	8/29/17	8/29/17

If document is included, check YES. If not, check NO and explain.

	YES	NO
Document(s) for signature/concurrence	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cover letter	<input checked="" type="checkbox"/>	<input type="checkbox"/>
New Case Form (if docket number not yet issued)	<input checked="" type="checkbox"/>	<input type="checkbox"/> <u>FIFRA-10-2017-0105</u>
Communication plan	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Required notice to State agency (only for CWA 309(a) orders, CAA 113(a) orders)	<input type="checkbox"/>	<input type="checkbox"/> <u>NA</u>
Press release (if applicable from communication plan)	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Write-up for OECA weekly report	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Case conclusion data sheet	<input checked="" type="checkbox"/>	<input type="checkbox"/> <u>Will complete upon company response</u>

Is facility located in Indian Country and/or is a Tribal Facility (i.e., owned or controlled by a federally recognized Indian tribe) or a Native Corporation? ☐ YES ☒ NO

Does this action potentially affect Tribal interests? ☐ YES ☒ NO

If YES, fill out and attach Addendum A: Enforcement Actions Involving Indian Tribes or Native Corporations.

Is the Facility located on Federal Lands and or operated by the Federal Government? ☐ YES ☐ NO

If YES, has the Region 10 Federal Facility Program Manager been informed? ☐ YES ☐ NO

Is the facility located in an area with Environmental Justice concerns? ☐ YES ☐ NO

Does the case involve a Nationally Significant Issue? ☐ YES ☐ NO

If YES, explain issue and OECA involvement:

RETURN package to COMPLIANCE OFFICER for mailing.

* For documents to be signed by an OCE manager, attach a completed OCE Correspondence Action Request.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Attorney-Client Privilege
Enforcement Confidential
Do Not Disclose

COMPLIANCE DETERMINATION

FROM: Chad Schulze, Pesticides and Toxics Unit
THRU: Kelly McFadden, Unit Manager
TO: Brett Dugan, Office of Regional Counsel
SUBJECT: Lowe's Home Centers, LLC
DOCKET NO. FIFRA 10-2017-0105
DATE: March 27, 2017

I. SUMMARY

Respondent: Mr. Robert A. Niblock, Chairman, President and CEO
Lowe's Home Centers, LLC – Corporate Office
Mailing Address:
1000 Lowes Blvd
 Mooresville, NC 28117
Principal Office:
1605 Curtis Bridge Road
Wilkesboro, NC 28697

Registered Agent: CSC-Lawyers Incorporating Service Company
221 Bolivar Street
Jefferson City, MO 65101

Facility Type: Pesticide Retailer/Distributor

Product: "Black Flag Disposable Fly Trap"

Evidence: March 20, 2014 email from Linda Hollis, Chief of the Biochemical
Pesticides Branch to Chemsico

January 22, 2015, North Carolina Department of Agriculture and
Consumer Services' for-cause inspection at Lowe's Home Centers, LLC,
#595, 509 River Highway, Mooresville, NC 28117

April 15, 2015, Advisory Letter from James Miles, Chief of the Pesticide and Tanks Enforcement Branch (PTED) in the Waste and Chemical Enforcement Division (WCED), to Chemsico (listed as "United Industries Corporation" on the Letter), Spectrum and Black Flag

September 11, 2015, Referral from EPA Headquarters and follow-up correspondence

September 27, 2016, Marketplace Inspections at Lowes Home Centers, LLC, 2700 Rainier Ave South, Seattle, WA 98144

January 4, 2017, Washington State Department of Agriculture Chemical and Hop Laboratory analytical results

February 16, 2017, Office of Pesticide Programs response to EPA Region 10's December 7, 2016, Enforcement Case Review.

March 26, 27, 28, 29 and 30, 2017, print-outs of the Lowe's Home Center website "offering for sale" "Black Flag Disposable Fly Trap"

Alleged Violations: FIFRA Section 12(a)(1)(A)

EJ Issues: None noted from EJSCREEN (Exempt FIFRA SSURO)

II. CASE BACKGROUND

See the report for the September 27, 2016, Lowe's Home Center, LLC (Lowe's), inspection for a detailed account of the case background on this issue. The "Black Flag Disposable Fly Trap" is produced and distributed by Chemsico, a Division of United Industries Corporation ("Chemsico") under the Black Flag brand label. United Industries Corporation is a subsidiary of Spectrum Brands, Inc. Spectrum Brands, Inc. has several Corporate Offices depending on the type of product, see <http://www.spectrumbrands.com/AboutUs/Locations.aspx>.

I have summarized pertinent information from the report below:

Past EPA Headquarter Actions/Correspondence:

This issue can be traced back to 2012 when a competitor, Sterling International (Sterling), began

complaining of unregistered competitor products in the marketplace. Sterling had been told in 2008 by the Office of Pesticide Programs (OPP) that its insect traps had to be registered as pesticides since they included non-food, non-pheromone attractants. Sterling registered their line of insect traps and then noticed similar, unregistered products from other companies in the marketplace.

In 2013, OPP began meeting with the other companies to bring their products into compliance with FIFRA. The two main companies were Black Flag and Starbar Brand (associated with Wellmark International). Between 2013 and 2016, EPA Headquarters provided registration guidance to Black Flag, including an April 15, 2015, Advisory Letter clarifying that several Black Flag products “may contain ingredients that require the products to be registered under Section 3 of FIFRA, 7 U.S.C. 136 § 136a.”

On March 20, 2014, prior to the Advisory Letter, Linda Hollis of the Office of Pesticide Programs (OPP), sent Tracy Heinzman, an Attorney hired by Chemsico, an email specifically describing the ingredients that, if used in traps, would require the products to be registered as pesticides. Ms. Hollis stated the following for Black Flag products containing Indole:

Indole is an ingredient in the Bull Run and Black Flag product. BPPD has previously determined that indole is neither a food nor a pheromone. Indole is a substance that is naturally occurring in animal waste and a component in some plants. At low concentrations, it gives off an aromatic, flowery smell. Indole contains benzene rings, and therefore, is not a pheromone. At high concentrations, it gives off a fecal odor. Indole is a common ingredient in perfumes and synthetically produced essential oils. Its mode of action in a trap is as an attractant. Filth flies are drawn or attracted to the trap because of the fragrant smell produced by the indole. In terms of indole being classified as a food, we have determined that indole, even though it is a component of a plant, is not a food itself and is not a “commonly consumed food commodity” that is “commonly consumed for its nutrient properties” per the tolerance exemption language found at 180.950(a). Therefore, products containing Indole as the active ingredient are subject to registration under FIFRA.

Throughout 2015 and 2016, Sterling continued reporting to EPA and Washington State Senators that they were finding “Black Flag Disposable Fly Traps” in the marketplace, specifically in home and garden stores in Washington State. In response, EPA Headquarters asked EPA Region 10 to find, collect and analyze the “Black Flag Disposable Fly Trap” to determine if the product contained ingredients that require EPA registration as a pesticide.

Product Labeling:

On September 27, 2016, I conducted a for-cause marketplace inspection at the Lowe’s retail store, at 2700 Rainier Ave South, Seattle, Washington 98144, to find, collect and analyze the

“Black Flag Disposable Fly Trap” as requested by EPA Headquarters.

During the inspection, I identified, photographed and collected samples of the “Black Flag Disposable Fly Trap” product. The trap packaging included a plastic bag (the trap) with a small pouch of light-yellow attractant powder. The traps were sold in a cardboard cut-out box that stated:

- Black Flag Disposable Fly Trap
- Kills Insects By Drowning
- Starts Working in Minutes
- Attracts All Major Fly Species
- Leak Proof * No Mess Discreet Design Blends Into Landscape

The box also had a graphic depicting a fly being killed by the “Black Flag” pole.

The “Black Flag Disposable Fly Trap” label printed on the plastic bag stated, in pertinent parts:

- Black Flag Disposable Fly Trap
- Locate fly source outdoors. Common fly sources include garbage bins, compost piles, dog runs or kennels and campsites
- Fill bag with water until water reaches the “Fill Line”
- Hang trap outdoors near fly source with included plastic tie to attract flies away from outdoor living spaces
- Attractant in trap will dissolve in water, sending an outdoor odor to lure flies into trap
- Hang trap in well-ventilated area to avoid odor
- Distributed by Chemsico, Division of United Industries Corporation

The label also appeared to have a word for word Spanish translation to the right of the English text. The trap label contained five EPA establishment numbers. According to the LOT numbers on the packaging “BX-03286”, the correct EPA establishment number was, “EPA Est. No. 80202-MO-1 (BX)” out of Manchester, Missouri (see Figure 4 in the report for the September 27, 2016, inspection).

Product Distribution and Sale:

On January 22, 2015, the North Carolina Department of Agriculture and Consumer Services’ (NCDACS) conducted a for-cause inspection on EPA’s behalf at Lowe’s Home Centers, LLC, #595, 509 River Highway, Mooresville, NC 28117. NCDACS was responding to a tip and complaint regarding the product “Black Flag Disposable Fly Traps.” During the inspection, the NCDACS identified 34 separate units of “Black Flag Fly Traps” from two LOT#’s BX06064 and BX03244. According to records collected by the inspector, the last time the Mooresville Store

received "Black Flag Disposable Fly Traps" from their Statesville regional distribution center was October 27, 2014. The inspector also collected an invoice (#99493457) that shows Spectrum Brands sold and distributed 2,400 "Black Flag Disposable Fly Traps" to Lowes Companies, Inc. on July 12, 2014. The invoice lists "BF Disposable Outdoor Fly Trap 12/1 CT" with a SKU of 422234. This SKU matches the SKU on the Lowes transfer record for "BF Disposable Fly Trap."

NCDACS photographed the packaging for the "Black Flag Disposable Fly Trap" and the cardboard cut-out box in which the units were sold. Photographs collected by the NCDACS inspector showed the cardboard cut-out box and the product label contained identical claims to the products collected by EPA Region 10 in all material respects.

On September 8, 2016, prior to conducting the September 27, 2016, inspection, EPA Region 10 visited the Lowe's web page, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>. The webpage offered for sale the product, "Black Flag Disposable Fly Trap." Customers could have the product delivered directly to their home or organize a pick-up at a local retail location. On September 15, 2016, EPA Region 10 purchased eight "Black Flag Disposable Fly Trap" products through this site and picked them up at the Lowe's Lynnwood, Washington location. On September 27, 2016, just before conducting the inspection, EPA Region 10 again visited the Lowe's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that "Black Flag Disposable Fly Trap" products were still offered for sale. On March 26, 27, 28, 29 and 30, 2017, EPA Region 10 again visited the Lowe's webpage, <https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465> and noted that the "Black Flag Disposable Fly Trap" products were being offered for sale each day.

During the September 27, 2016, Inspection, the EPA Region 10 inspector purchased two "Black Flag Disposable Fly Trap" products at the Lowe's 2700 Rainier Ave South, Seattle, Washington location.

During the September 27, 2016, inspection, I requested the following on the Receipt for Samples signed by the Assistant Store Manager, Nick Elliott:

004 – Any and all paperwork regarding the purchase, order and /or receipt of Black Flag Disposable Fly Traps over the last year (9/15/15 to present)

To be provided to:

Chad Schulze

EPA Region 10

1200 6th Ave

Seattle, WA 98101 or

Schulze.chad@epa.gov by 10/14/2016

As noted in the inspections report, these records were not received. I contacted the Lowe's

Customer Service desk in mid-October and again in late November for these records but was never able to get a hold of Mr. Elliott. Ultimately, We do have evidence that these products were being “offered for sale” (I.E. distributed and sold as define by FIFRA) on September 8, 15 and 27th both online and in the Seattle Lowe’s Home Center at 2700 Rainier Ave South, Seattle WA 98144.

Product Composition:

On September 28, 2016, I shipped three separate “Black Flag Disposable Fly Trap” units to The Washington State Department of Agriculture’s Chemical and Hops Laboratory (WSDA CHL) for analysis. I requested the samples be analyzed for Indole and/or Heptyl Butyrate or any other attractant present in the product. I sent two of the eight traps purchased from the Lowe’s website (<https://www.lowes.com/pd/BLACK-FLAG-Disposable-Fly-Trap/3818465>) on September 15, 2016, by Pamela Gahner, EPA Region 10 Office of Compliance and Enforcement Office Manager (Sample No.’s 091516-F17746-001-001-CS and 091516-F17746-001-002-CS), and one trap collected during the September 27, 2016, inspection (Sample No. 092716-F17746-001-001-CS). I sent two of the traps purchased from the Lowe’s website because they were from two separate batches (LOT# BX-05236 and BX-03286). Both traps collected during the September 27, 2016, inspection were from one batch, LOT# BX-03286, so I only submitted one sample. I sent the Chain of Custody with the samples which WSDA CHL signed and returned to EPA on September 29, 2016.

On October 25, 2016, WSDA CHL Program Manager, Mike Firman, emailed me in follow-up to a conversation we had the day before in which Mr. Firman stated they found 2-piperidinone in their preliminary analysis of the “Black Flag Disposable Fly Trap” samples. Mr. Firman stated that they would have to purchase additional analytical methods if EPA wanted the lab to try and quantify the amount. I told Mr. Firman to go ahead and obtain the methods. Mr. Firman warned that it might delay the final report of analysis.

I received the analytical results from WSDA CHL on January 4, 2016. The results showed that all the three traps contained Indole (CAS #120-72-9) at concentrations varying between 8.10 and 11.3 ppm. The results also showed that each trap also contained trace amounts of 2-piperidinone (CAS #675-20-7).

Currently, there are two pesticides registered with EPA containing Indole as the active ingredient and one pending.

Pending and Active Registrations For
Ingredient
025000 / 120-72-9 / Indole

Registration #	Registration Name	Company #	Company Name	Current Status	% of Active Ingredient
83687-R	NO HOLES GARDEN SPRAY	83687	BAER ENTERPRISES, LLC	<u>Pending - Under Review (29-Nov-2006)</u>	.5
84565-2	BULL RUN FLY ATTRACTANT	84565	BULL RUN SCIENTIFIC, VBT	<u>Active - Registered (02-Jun-2009)</u>	.2
89459-11	STARBAR FLY ATTRACTANT	89459	CENTRAL GARDEN & PET COMPANY	<u>Active - Registered (15-Jun-2015)</u>	.2
Total Rows: 3					

OPP ECR Response:

After several conversations with EPA Headquarters regarding the preliminary results by the WSDA CHL, I submit an Enforcement Case Review (ECR # 17-10-3) on December 7, 2016, and asked OPP to determine the product's status as pesticide. I posed the following questions:

- 1) Would this product be considered a pesticide and require EPA registration if the lure package only contained dry yeast beads and non-food grade egg powder [The original tip and complaint from a competitor stated the product contained dry yeast beads and non-food grade egg powder]?
 - a) Do dry yeast beads and non-food grade egg powder meet any registration exemption (such as 152.25(d) Foods)?
 - b) If this product does not need to be registered as a pesticide, would it need to be regulated as a device?
 - c) If the product does not need to be regulated as a pesticide or a device, would the product be in violation of FIFRA because it bears an EPA establishment number?
- 2) Would this product be considered a pesticide and require EPA registration if the lure package contained Indole Butyrate and/or Heptyl Butyrate?
- 3) If the lab's preliminary analysis holds true and the lure package contains 2-

Piperidinone, would this product be considered a pesticide and require EPA registration?

I noted after I received the WSDA CHL results on January 4, 2017, that I had incorrectly listed “Indole” (CAS #120-72-9) as “Indole Butyrate” (CAS #133-32-4) in the ECR. That same day I reported this mistake to EPA Headquarters (see Attachment 14 in the inspection report). On January 31, 2017, Ms. Heller, Waste and Chemical Enforcement Division, forwarded my email to OPP for their consideration in responding to the December 7, 2016, ECR.

On February 22, 2017, I received a notification from the Public Health Tracking System (PHTS) that OPP had completed their response to ECR #17-10-3 (Attachment 16). In summary, OPP stated:

Black Flag Disposal Fly Trap meets both the pesticidal claims and pesticidal use tests under 40 CFR § 152.15, and therefore is a pesticide that requires registration by EPA. At this time, no exemptions or exclusions appear to be applicable to the subject product.

III. FINDINGS

The statements above in connection with the distribution and sale of “Black Flag Disposable Fly Trap” are considered pesticidal claims.

In addition, “Black Flag Disposable Fly Trap” contains Indole, a known pesticide active ingredient. Currently, there are two products registered with EPA that contain Indole.

“Black Flag Disposable Fly Trap” is not registered as a pesticide under FIFRA Section 3.

Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to sell or distribute to any person any pesticide that is not registered under section 3 of FIFRA.

Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a “person” as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide,” in part, as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” See also 40 C.F.R. § 152.15.

Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “any insect, rodent, nematode, fungus, weed, or . . . any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section [25(c)(1) of FIFRA].”

The regulation at 40 C.F.R. § 152.15 states that “[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if: (a) the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) . . . [t]hat the substance . . . can or should be used as a pesticide; . . . or (b) [t]he substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than . . . use for pesticidal purpose (by itself or in combination with any other substance) . . . or (c) [t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.”

Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.” This section also defines “labeling” as “all labels and all other written, printed, or graphic matter (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device”

Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” as “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served.”

The regulation at 40 C.F.R. § 152.3 further defines “distribute or sell” as “the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.”

According to 40 C.F.R. § 152.3, a product becomes “‘released for shipment’ when the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment.”

The regulations at 40 C.F.R. § 168.22(a) state, in part, “FIFRA sections 12(a)(1) (A) and (B) make it unlawful for any person to ‘offer for sale’ any pesticide if it is unregistered EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.”

IV. POTENTIAL VIOLATIONS

Any distribution or sale of the unregistered pesticide "Black Flag Disposable Fly Trap" is in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

FIFRA Section 13(a) provides the Administrator the authority, and those delegated such authority, to issue Stop Sale, Use or Removal Orders whenever there is reason to believe, based on inspections or tests, that any pesticide or device is in violation of any of the provisions of the Act, or that such pesticide or device has been or is intended to be distributed or sold in violation of any such provisions. The Administrator may issue a written or printed "Stop Sale, Use or Removal" Order to any person who owns, controls, or has custody of such pesticide or device, and after receipt of such order, no person shall sell, use, or remove the pesticide or device described in the order except in accordance with the provisions of the order.

Communication Plan

Project Manager or Case Developer

Chad Schulze

Unit Manager

Kelly McFadden

Attorney

Brett Dugan

Estimated Announcement Date

Quarterly Round-up

Project Summary

EPA Region 10 is issuing this Stop Sale, Use, or Removal Order (SSURO) to Lowe's Home Centers, LLC (Mooresville, North Carolina) to prevent the distribution and sale of the product, "Black Flag Disposable Fly Trap." This product contains the known pesticide active ingredient, Indole, but is not registered with EPA under FIFRA Section 3 as a pesticide.

Contacts & Notifications

People that need to know about this news: managers, respondents, respondent's attorney, PRPs, other agencies, tribes

Name	Title	Agency/Org	Email/Phone	When to	Who notifies
Anne Dalrymple	OCE Weekly	EPA	dalrymple.anne@epa.gov	After	Program
Jo Jiles	CCDS	EPA	Jiles.Jordana@epamail.epa.gov	After	Program
Kimberly Bingham	Chief	EPA Region 4	bingham.kimberly@epa.gov	After	Program
Don Lott	Associate Director	HQ's - WCMD	Lott.don@epa.gov	After	Program
Larry Stanfield	Dep Asst Admin	OECA	Starfield.lawrence@epa.gov	After	ORC or OCE Director

Region 10 Issues Stop Sale, Use, or Removal Order to Lowe's Home Centers, LLC (Mooresville, North Carolina) for FIFRA Violations

EPA Region 10 is issuing this Stop Sale, Use, or Removal Order (SSURO) to Lowe's Home Centers, LLC (Mooresville, North Carolina) to prevent the distribution and sale of the product, "Black Flag Disposable Fly Trap." This product contains the known pesticide active ingredient, Indole, but is not registered with EPA under FIFRA Section 3 as a pesticide. Contacts: Brett Dugan, 206-553-4858; Chad Schulze 206-553-0505.